

## INTEROFFICE MEMORANDUM

### Law Department

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DATE: September 6, 2013

TO: ✓Jean Stothert, Mayor  
City Council

FROM: Paul Kratz, City Attorney

SUBJECT: Residency Requirements for Board of Directors of the Metropolitan Entertainment & Convention Authority

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As a result of an August 23, 2013, article in the *Omaha World Herald*, it has come to the attention of the City of Omaha that Jamie Gutierrez Mora, the City's most recent appointment to the Board of Directors of the Metropolitan Entertainment & Convention Authority ("MECA") may not satisfy the qualifications for such appointment. As the appointing authority, it is now incumbent upon the City to investigate the appropriateness of the appointment.

### FACTS

The real estate records in Sarpy County indicate that in 1997, Ms. Gutierrez began living in a 3,000-square-foot home valued at a little over \$300,000. This residency was located in Papillion, Sarpy County, Nebraska. Then, in 2009, she purchased a 3500-square-foot house for over \$700,000 located in Bellevue, Sarpy County, Nebraska. In 2006, Ms. Gutierrez purchased a vacation home in California and, for purposes of California tax records, indicated her mailing address as the above-referenced Papillion home which was later changed to the Bellevue address. In December of 2011, a driver's license was issued to Ms. Gutierrez listing her Bellevue address as her home. In late 2012, Ms. Gutierrez and her husband purchased an automobile listing the Bellevue address as their home.

In 2011, Ms. Gutierrez signed a Sarpy County voter registration form indicating that her address was at the above-referenced Bellevue address. She voted in the November 2012 presidential election in Sarpy County. On December 28, 2012, she registered to vote in Douglas County using the address of 5029 South 19<sup>th</sup> Street, Omaha, Douglas County, Nebraska. This house is owned by her husband, and he is the only person listed as the owner and is paying the utility bills. This house is listed as a multiple residence valued at approximately \$125,000. After registering in Douglas County, Ms. Gutierrez voted in neither the Omaha primary in April 2013 nor the general election in May 2013.

Finally, in February 27, 2013, she submitted a résumé to the City Council Office that did not indicate a residence. The next day she notified the City Council Office that she had selected

Jean Stothert, Mayor  
City Council  
September 6, 2013  
Page 2

SUBJECT: Residency Requirements for Board of Directors of the Metropolitan Entertainment & Convention Authority

the above-referenced 5029 South 19<sup>th</sup> Street property as her domicile. She submitted a résumé with the Omaha address on the next day.

## ANALYSIS

Pursuant to the Development Agreement between the City of Omaha, MECA, DONORS Trust, and Peter Kiewit Foundation, MECA is to have “a Board of Directors consisting of five (5) *resident electors* of Douglas County, Nebraska.” (Emphasis supplied.)(Section 7.2.1 Amended & Restated Development Agreement). A review of MECA’s bylaws indicates that there is no reference to a residency requirement and only the following statement with regard to qualifications of the directors is included:

Section 5.2 (c) Qualifications. No elected official and no employee of the City of Omaha or County of Douglas, Nebraska, shall be permitted to serve as a Director of the Corporation. Such limitation shall apply at all times.

Nonetheless, the Agreement between the City and MECA is binding; and therefore, those terms are valid and supersede any bylaws the Board establishes.

The issue is then who is a “resident elector of Douglas County”? The Attorney General has issued several opinions on this subject and has recognized that “[g]enerally, the term ‘residence’ can only be defined in context of the legislation within which it is used.” 1978 Neb. Op. Atty. Gen. No. 443. Obviously, there is no definition provided in the above-referenced Agreement. Therefore, this term must be analyzed under the laws of Nebraska. In *Krajicek v. Gale*, 267 Neb. 623, 677 N.W.2d 488 (2004), the Nebraska Supreme Court held “residence” is understood to mean one’s actual domicile. The Court cited NEB. REV. STAT. § 32-116(1) which defines “residence” under the Nebraska Election Act as:

[t]hat place in which a person is actually domiciled, which is the residence of an individual or family, with which a person has a settled connection for the determination of his or her civil status or other legal purposes because it is actually or legally his or her permanent or principal home, and to which, whenever he or she is absent, he or she has the intention of returning.

Tim Krajicek was a candidate for reelection to the Board of Directors of the NRD. During his term, he moved out of his district; and the Secretary of State refused to place his

Jean Stothert, Mayor  
City Council  
September 6, 2013  
Page 3

SUBJECT: Residency Requirements for Board of Directors of the Metropolitan Entertainment & Convention Authority

name on the ballot as a candidate for the subdistrict in which he no longer resided. The State alleged that he vacated his office when he moved out of the district. Please note that NEB. REV. STAT. § 2-3215 specifically provides that “a vacancy on the board shall exist in the event of the removal from the district or subdistrict of any director.” Krajicek admitted he did move out of the district but that he also maintained another residence (not the one he previously lived in) within the district. The Court was not persuaded by his argument. They found that he ceased to be domiciled in the district when he moved to a residence outside the district. They found he spent the nights at the out-of-district residence and that is where he received his mail. The residence in the district was owned and occupied by his aunt and uncle. Krajicek evidently used his relatives’ address for purposes of voting, registering his vehicle, and receiving some mail. Nonetheless, the Supreme Court found that Krajicek was not domiciled at the address within the district and was, therefore, properly removed from NRD Board of Directors.

In coming to their conclusion in *Krajicek*, the Supreme Court opined that to establish a domicile, two essential facts must be present: 1) residence, or bodily presence, in the locality; and 2) an intention to remain there. The Court noted that there is no exact definition; but in determining domicile, one must look to all the facts and circumstances. *Id.*, see also *State v. Jensen*, 269 Neb. 213, 691 N.W.2d 139 (2005). “It is not residence alone, but it is the intention of the person, expressed or implied from the facts in evidence, conjoined with residence, that determines domicile.” *Jensen*, 269 Neb. 219, 691 N.W.2d at 145; *In re Estate of Meyers*, 137 Neb. 60, 67, 288 N.W. 35, 38 (1939) (quoting *Reeds' Will*, 48 Or. 500, 87 P. 763 (1906)).

In *Jensen*, the Supreme Court specifically noted that in ascertaining domicile, the act of registering and voting is of particular significance. *Jensen*, 269 Neb. at 218, 691 N.W.2d at 144.

In doubtful cases particular significance should be attached to the *repeated exercise of the right to vote*, because this right depends upon citizenship and domicile, and must be generally, if not universally, supported by the oath of the voter. [S]uch act is a distinct, unequivocal and public assertion by the voter of his legal domicile. (Emphasis supplied.)

*In re Estate of Meyers*, at 66, 288 N.W. at 38 (quoting *Cooper's Adm'r v. Commonwealth*, 121 Va. 338, 93 S.E. 680 (1917)).

In the instant case, where the director is registered to vote is significant because the Agreement specifically states that the directors are not only to be residents of Douglas County but “resident electors.” *Black's Law Dictionary* defines “elector” as “a duly qualified voter.”

Jean Stothert, Mayor  
City Council  
September 6, 2013  
Page 4

SUBJECT: Residency Requirements for Board of Directors of the Metropolitan Entertainment & Convention Authority

Nebraska case law has not had the opportunity or need to define this term since the late 1800s when the State was new as was the election process. In *State ex rel. Richards v. McMillen*, 23 Neb. 385, 36 N.W. 587 (1888), the Supreme Court found that an “elector” was “every male person of the age of 21 years or upwards . . . who shall have resided in this state for six months, and in the county, precinct, or ward for the term provided by law.” Obviously, the definition has been expanded, but the essence seems to be as *Black’s Law* defines it—“a qualified voter.” The qualifications of electors are specifically set forth in Nebraska’s State Constitution, Article VI, Sec. 1, which states:

Every citizen of the United States who has attained the age of eighteen years on or before the first Tuesday after the first Monday in November and has resided within the state and the county and the voting precinct for the terms provided by law shall, except as provided in section 2 of this article, be an elector for the calendar year in which such citizen has attained the age of eighteen years and for all succeeding calendar years.

Other courts have attempted to define this somewhat amorphous term. What is clear is that “citizen” and “elector” are not necessarily synonymous, *In re Rousos*, 119 N.Y.S. 34 (N.Y. Sup. 1940); and citizenship and residence alone do not make one an “elector.” *Donovan v. Comerford*, 332 Ill. 230, 163 N.E. 657 (1928), cert. denied, 49 S.Ct. 263, 279 U.S. 842, 73 L.Ed. 988). Moreover, a person may be a taxpayer and not be an elector. *Harrison v. Board of Com’rs of Bannock Co.*, 68 Idaho 463, 198 P.2d 1013(1948).

There certainly are situations that arise where a person may have more than one residence. But as we know, a person can only be an elector in one place. This situation arose in the *Jensen* case cited above. In *Jensen*, a mother and her adult son were charged criminally and subsequently found guilty of illegal voting in the village of Royal, Nebraska. Evidence showed that the parties had domiciles in Royal and in Verdigree, and evidently split their time between the two due to the son’s serious health condition. With regard to the son, the Court considered the son’s “repeated exercise of voting in the Royal elections since 1996 was a public assertion which clearly established his intent” to have Royal his domicile. *Jensen*, 269 Neb. at 221, 691 N.W.2d at 146.

In this case, it is clear that Ms. Gutierrez is, and remains, a long-time resident of Sarpy County and that she has no intention that the Omaha address be her permanent and principal home. It is inconceivable that she has moved from her large Bellevue home to a small, old, multi-unit house in Omaha. Simply listing the house as her domicile does not, in fact, make it

Jean Stothert, Mayor  
City Council  
September 6, 2013  
Page 5

SUBJECT: Residency Requirements for Board of Directors of the Metropolitan Entertainment & Convention Authority

her residence. Further, even though Ms. Gutierrez changed her voter registration to Douglas County, she never *actually* voted in Douglas County despite two opportunities to do so. Rather, she has a history of voting in Sarpy County.

Given the facts, it is my opinion that Jamie Gutierrez did not meet the required qualification of being a “resident elector” of Douglas County.

#### SOKOL SITUATION

Some have suggested that this situation is analogous to the David Sokol issue—when Mr. Sokol declared to the Election Commissioner that he no longer intended to vote in Douglas County. However, shortly after making such a declaration, Mr. Sokol changed his mind and re-registered as a Douglas County voter on February 20, 2008. In addition, Mr. Sokol had been a long-time resident and voter of Douglas County living in his home in Linden Estates. Mr. Sokol did buy a home in Wyoming and sold his Linden Estates home on April 21, 2008. Prior to that, however, he purchased a condominium in the Old Market area of Omaha on April 14, 2008. It became clear that even though he had a home in Wyoming, his business was in Omaha; he continued to work in Omaha and did not commute daily from Omaha to his home in Wyoming. It is reasonable to assume that his intentions were to return each night to his condominium in the Old Market and make that his primary residence.

#### REMOVAL

Section 7.2.1 of the above-referenced Agreement provides: “Any member of such board may be removed from office by the Mayor, for incompetence, neglect of duty, or malfeasance in office, with the consent and approval of the City Council.” Further, the MECA bylaws provide at Section 5.9 that: “Any director may be removed at any time with or without cause by the board. Any director may be removed from office by the Mayor for incompetence, neglect of duty, or malfeasance in office, with the consent and approval of the City Council.”

“Incompetency” is defined in *Black’s Law Dictionary* as: “Lack of ability, *legal qualification*, or fitness to discharge the required duty.” (Emphasis supplied.) (*Black’s Law Dictionary, Revised 4<sup>th</sup> Edition*.) The United States Supreme Court dealt with the term “incompetency” as applied to the qualification of a teacher and stated as follows:

Jean Stothert, Mayor  
City Council  
September 6, 2013  
Page 6

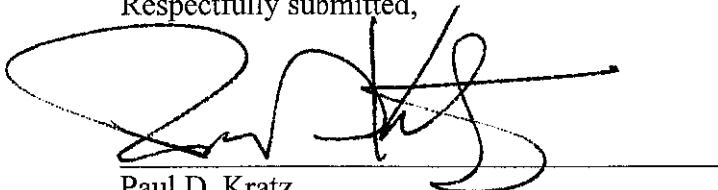
SUBJECT: Residency Requirements for Board of Directors of the Metropolitan Entertainment & Convention Authority

'The term 'incompetency' has a 'common and approved usage'. The context does not limit the meaning of the word to lack of substantive knowledge of the subjects to be taught. Common and approved usage give a much wider meaning. For example, in 31 C.J., with reference to a number of supporting decisions, it is defined: 'A relative term without technical meaning. It may be employed as meaning disqualification; inability; incapacity; lack of ability, *legal qualifications*, or fitness to discharge the required duty.'

*Beilan v. Board of Public Education, School District of Philadelphia*, 357 U.S. 399, 78 S.Ct. 1317, 1323.

Accordingly, the Agreement and MECA's bylaws allow for removal by the Mayor with consent and approval of the City Council if so desired.

Respectfully submitted,

  
Paul D. Kratz  
City Attorney

PDK/dlm